Supreme Court, U.S.
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(2)

No. 90-1739

In The

Supreme Court of the United States

October Term, 1990

FUQUA INDUSTRIES, INC., a Delaware Corporation; QUALEX INC., a Delaware corporation, as successor by merger to COLORCRAFT CORPORATION, a North Carolina corporation,

Petitioners,

v.

RUTH F. JANDRUCKO, individually,

Respondent.

Petition For Writ Of Certiorari To The First District Court Of Appeal For The State Of Florida

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE FEDERAL COURTS MAY REVISIT THE MERITS OF A FINAL STATE COURT ORDER AWARDING WORKERS' COMPENSATION BENEFITS FOR A MEDICALLY DOCUMENTED POST-TRAUMATIC PHOBIA WHERE ALL PUTATIVE FEDERAL CLAIMS RAISED BY THE EMPLOYER/CARRIER'S PETITION FOR WRIT OF CERTIORARI WERE DISPOSED OF BY THE STATE TRIBUNAL HAVING FINAL JURISDICTION OVER SAME. (Restated)

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JURISDICTION

1. MOOTNESS

Petitioners are seeking certiorari review of a Florida workers' compensation order which ordered, *inter alia*, that Petitioners pay all past due psychiatric bills, reinstate psychiatric treatment for the Respondent's post-traumatic phobia, and pay temporary total indemnity benefits for the period of February 17, 1987 to date and continuing so long as appropriate.

Although Petitioners appealed the award of the aforementioned benefits, they abandoned the issue of psychiatric care during the pendency of the appeal and, on October 24, 1990, they re-authorized psychiatric treatment by Ronald Bergman, Ph. D. and forwarded a letter to Dr. Bergman stating, "treatment is authorized as you deem medically necessary for recovery on this incident". (App. 1) Respondent continues to receive treatment, to this very day.

On April 26, 1991 after the Honorable Kenneth L. Ryskamp, Judge of the United States District Court for the Southern District of Florida, vacated a previously-entered temporary restraining order and denied Petitioners' request that he temporarily enjoin Respondent from enforcing the portion of the workers' compensation order which awarded her indemnity benefits, Petitioners appeal the denial of their request for a preliminary injunction. (App. 6-10) However, Petitioners did not request or obtain a stay of execution addressed to the workers' compensation order, and on May 2, 1991, Petitioners issued a draft to Respondent in payment of the indemnity benefits they had appealed. (App. 2-5)

Respondent anticipates that Petitioners will argue that the workers' compensation order is not moot because it also awarded temporary total disability benefits "continuing [from April 26, 1990 forward] so long as appropriate" along with attorneys' fees and taxable costs. However, Petitioners did not appeal the language awarding continuing indemnity benefits and therefore have waived any right to review of same. *See, e.g., Rinker Materials Corp. v. Hill*, 471 So.2d 119 (Fla. 1st DCA 1985) and *Sunland Hospitals/State of Florida v. Garrett*, 415 So.2d 783 (Fla. 1st DCA 1982). Moreover, the workers' compensation order does not determine the quantum of attorneys' fees or taxable costs and is therefore non-final and non-appealable as to these matters, *e.g., Lido Spa Hotel v. Perez*, 418 So.2d 303 (Fla. 1st DCA 1982).

Accordingly, it is respectfully suggested that Petitioners have complied with the provisions of the workers' compensation order which they are asking this Court to review and that the Constitutional requirement of a "case or controversy" has not been met.

2. THE HIGHEST FLORIDA COURT HAVING JURISDICTION HAS ALREADY CONSIDERED AND DISPOSED OF PETITIONERS' CONSTITUTIONAL CLAIMS.

Petitioners have advised this Court that they are "in doubt whether the Florida First District Court of Appeal considered [their] constitutional claims" because it affirmed the workers' compensation order per curiam. However, the First District Court of Appeal, the highest court in Florida having jurisdiction to consider plenary

workers' compensation appeals, *does* have jurisdiction to consider constitutional issues even though they may not have been adjudicated by the Judge of Compensation Claims. In *Metro-Dade Water & Sewer Authority v. Cormio*, 388 So.2d 1238 (Fla. 1st DCA 1979), a panel of the First District Court of Appeal adjudicated, head-on, the constitutionality of certain provisions of the Florida Workers' Compensation Act which appellees therein alleged violated the equal protection provisions of the state and federal constitutions. *Id.* at 1239. *See also, Rollins v. Southern Bell Tel. & Tel. Co.*, 384 So.2d 650 (Fla. 1980), which affirmed a decision of the former Industrial Relations Commission (the predecessor of the First District Court of Appeal vis-à-vis workers' compensation appeals) upholding the constitutionality of a statute.

Petitioners have suggested to this Court that the cases of *Ortega v. Owens-Corning Fiberglas Corp.*, 409 So.2d 530 (Fla. 1st DCA 1982) and *Sasso v. Ram Property Management*, 431 So.2d 204 (Fla. 1st DCA 1983) support their claim that the First DCA "has expressed doubts about its ability to hear and determine constitutional issues arising from workers' compensation claims." In *Ortega*, the Claimant had repudiated the entire workers' compensation act on the grounds that same was unconstitutional, and had chosen instead to bring an action for damages in the circuit (civil) court. The trial judge dismissed the action, stating that the claimant's constitutional claims could be carrier to the First DCA in the natural course of a workers' compensation claim. The First DCA (which, coincidentally, had geographical jurisdiction over the trial court) reversed, holding that Ortega's constitutional claims could not be considered as complementing a

workers' compensation claim because he had "assail[ed] chapter 440 as a whole and had ask[ed] for nothing that a deputy commissioner is empowered to grant", *i.e.*, damages in the traditional tort sense. Thus, because Ortega's claimed remedy (damages) was not available in workers' compensation proceedings, he could not use same to bootstrap a constitutional claim.[1]

The case of *Sasso v. Ram Property Management*, 431 So.2d 204 (Fla. 1st DCA 1983) contradicts Petitioners' claim that the First DCA doubts its ability to consider constitutional issues. In fact, that opinion states, at page 208, "As administrative officers, [workers' compensation judges] lack jurisdiction to consider claims of the facial unconstitutionality of any section of the Workers' Compensation Act. (citations omitted) However, *this court does have jurisdiction to consider such claims and is, effectively, the*

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[1] The court also stated that Chapter 120, Florida Statutes (commonly known as the Administrative Procedures Act) provides factfinding resources to a district court of appeal, for review of constitutional and non-constitutional issues in the interpretation of statutes, which are not available in Chapter 440 appeals. *Id.* at 532. However, as contrasted with situations in which an agency "may be required to explore the factual assumptions on which its accustomed interpretation of a statute is predicated", *id.* at 532, the instant Petitioners do not question the constitutionality of a state statute. Instead, they have asked this Court to review only *facts*, all of which were fully developed before the judge of compensation claims. It should be borne in mind that Petitioners urged the trial judge to address the putative constitutional issue, and thus their claims were anything *but* latent. *See Long v. Dep't. of Administration, Division of Retirement*, 428 So.2d 688, 693 (Fla. 1st DCA 1983).

most suitable court to which a claim of statutory unconstitutionality can be made." Thus, Petitioners' claim that the First DCA does not believe it has the authority to adjudicate constitutional questions is specious.

Lastly, any doubt Petitioners may have whether the First DCA considered their constitutional claims is unreasonable and groundless. The First DCA's *per curiam* affirmance of their appeal, unlike a denial of certiorari, impliedly rejected their arguments. *See Brastrom v. Grider*, 215 So.2d 501 (Fla. 4th DCA 1968) Not only did Petitioners raise their constitutional claims in briefs on the merits before the First DCA; they also filed a post-affirmance "Motion for Rehearing En Banc or, Alternatively, Request for Certification" which reargued their constitutional claims. (App. 11-15) Respondent filed an appropriate response, and the First District Court of Appeal dismissed the motion for rehearing *en banc* on procedural grounds but denied the request for certification and Petitioners' subsequent Motion for Clarification of Decision on the merits. (App. 16-21) Thus, the constitutional issues raised by Petitioners were argued before and adjudicated on their merits, by the highest Florida court having jurisdiction thereof.

As the issues raised by Petitioners herein were considered and rejected by the First DCA, their pending action in the federal district court is barred by the "Rooker-Feldman" doctrine, *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed. 206 (1983), and *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037 (1989) does not apply. Equally applicable is the principle of abstention, as

set forth in the cases of *Younger v. Harris*, 91 S.Ct. 746, 401 U.S. 37, 27 L.Ed. 669 (1971) and *Pennzoil Company v. Texaco, Inc.*, 107 S.Ct. 1519, 481 U.S. 1, 95 L.Ed. 1 (1987) and their offspring. Lastly, inasmuch as the identical issues raised by Petitioners are presently pending before both the United States District Court and the United States Court of Appeals for the Eleventh Circuit, Petitioners have not exhausted their claimed federal remedies and thus their request for certiorari should be denied.

STATEMENT OF THE CASE

Petitioners have not included in the body of their Petition for Writ of Certiorari numerous salient facts which would assist this Court in understanding the actual benefits requested by Respondent and the benefits actually awarded by the Judge of Compensation Claims. These facts, which are now *res judicata*, are set forth in the final order entered by the judge of compensation claims on April 26, 1990 and are only highlighted herein:

1. Not only was Respondent mugged in the course and scope of her employment; the uncontradicted medical evidence demonstrated that as a result thereof, she sustained a fractured vertebra at the L-2 level. As a result, she was left with a 20% permanent impairment of the body as a whole and, again, the uncontradicted medical evidence showed that she was restricted to sitting no more than 2 hours, walking no more than 1/4 mile, very light lifting only; driving only short distances, minimal bending, pulling, pushing and squatting, full reaching,

and working no more than 4 hours per day in a sedentary capacity only. (See Petitioners' Appendix at p. 5) At no time was any medical evidence presented showing that Respondent was "physically capable of returning to full-time employment", as claimed by Petitioners.

2. The uncontradicted *medical* evidence also showed that the Respondent developed a post-traumatic stress disorder characterized by flashbacks of the mugging, physiological signs of fear (sweating, racing heartbeat) and a phobia of black persons, especially black males. Both Dr. Bergman, her treating psychologist, and Dr. Daruna, a psychiatrist who examined Respondent in the course of the workers' compensation litigation, opined that she could not return to work *at all* until she received treatment, including desensitization. Both doctors also agreed that Respondent showed no predisposition toward bigotry and that she was ashamed of her fear of blacks. (Petitioners' Appendix at 5-6)

3. Respondent's supervisor, Harold Adams, testified that the only work available at Colorcraft was beyond Respondent's *physical* capabilities. He further testified that the adjuster at Fuqua Industries twice ordered him to tell Respondent that Petitioners had a job available within her physical restrictions when actually none was available. Mr. Adams also testified that Respondent had never said or done anything racially discriminatory; to the contrary, she socialized with her black colleagues and even brought food to work for several of them who were unmarried or temporarily short on funds.

4. At no time did Respondent testify that a segregated workplace was what she desired; to the contrary,

she asked that she be provided with psychiatric treatment so that she could get well and return to the normal work and social life that she enjoyed before this accident.

HOW FEDERAL QUESTIONS WERE RAISED AND PASSED ON BELOW

Respondent takes issue with Petitioners' claim that the Answer Brief filed by her in the First DCA proceedings argued that, "notwithstanding her desire not to associate with black persons, counsel was 'unable to comprehend the . . . contention that Ruth Jandrucko was racially biased' ".

Respondent would point out to this Court, as she did to the First DCA, that there must be a factual basis for any claim of unconstitutional racial discrimination. There was nary a shred of evidence that Respondent "desires not to associate with black persons", or that her phobia is anything other than a medical condition – in fact, the very medical condition for which she was claiming psychiatric treatment before the workers' compensation judge! For this reason, Respondent *was* unable to comprehend Petitioners' contentions and felt it unnecessary to address their multitudinous citations of federal constitutional cases.

Lastly, Respondent disagrees that the *per curiam* affirmance, without opinion, makes it impossible to determine what consideration the First District gave the constitutional issues raised by Petitioners. (*See* arguments, *supra*)

REASONS FOR NOT GRANTING THE WRIT

Contrary to Petitioners' allegation that the judge of compensation claims awarded benefits based upon Respondent's "unwillingness" to associate with blacks, the record below and the final order itself demonstrate that the award of psychiatric and indemnity benefits was predicated upon uncontradicted medical testimony proving that Respondent sustained severe physical and psychiatric trauma as a result of being mugged on April 4, 1986. Also contrary to Petitioners' claims, there was no evidence adduced showing that Respondent has any "discriminatory preference" whatsoever; rather, as demonstrated by the testimony of Drs. Bergman and Daruna and by the candid testimony of her supervisor, Harold Adams, who stated that Respondent had never acted in a racially discriminatory manner and was well-liked by her coworkers, whatever their racial or ethnic background. Petitioners' glib, deprecatory allegation that Respondent's phobia is actually a private discriminatory preference which "appears in the psychological garb of a 'post-traumatic stress disorder' " is factually unsupportable and shows that their true purpose in seeking certiorari relief is to harass Respondent, whom Petitioners obviously know is emotionally fragile. Petitioners are asking this Court to disregard the findings of medical fact and credibility made by the trial judge, and in so doing, they have grossly misrepresented same. As Petitioners themselves stated in pleadings filed in the Federal District Court, "arguments and statements of counsel have no factual status before the court and cannot substitute for evidence". Devitt & Blackmar, *Fed. Jury Prac. & Instructions* § 11.13. Respondent was injured in 1987, and

Petitioners have had four years to unearth any evidence of bigotry (or, as Petitioners' euphemistically term it, "discriminatory preference") on Respondent's part. Having been unable to do so, Petitioners attempted to create an alleged constitutional issue by phrasing their questions to Respondent and her supervisor in such a way as to elicit the response that "Respondent could not return to work at Colorcraft because she could not be guaranteed that she would not come into contact with black persons". Respondent, however, never stated that she wanted a segregated workplace, nor was same awarded; she merely asked for psychological counseling so that she could overcome her phobia and return to a normal, integrated workplace. It should be borne in mind that Colorcraft had no work available for Respondent within her *physical* restrictions during the time period in question, and thus Petitioners "self-created" issue of racial bias is actually academic. The facts remain (and these are the facts that Petitioners have not been able to argue around, despite numerous, creative attempts to do so) that Respondent has a medical condition, there is no evidence that it is anything other than a medical condition, and it is totally disabling. Nevertheless, Petitioners have blithely alleged the existence of racial bias and Respondent submits that their true purpose in doing so is to cause Respondent additional emotional grief and to cause her to expend funds to defend specious claims for relief.

The workers' compensation order herein clearly relies upon orthopaedic and psychiatric evidence that

Respondent's physical and psychological conditions have rendered her temporarily unable to return to work in any capacity. There is no "punishment" inherent in an award of workers' compensation benefits based upon medical evidence of a condition which is causally related to an on-the-job injury. Petitioners would have this Court believe that they are somehow the "victims" of Respondent's accident, when since the inception of this litigation they have done nothing but cause Respondent even more grief than her physical and psychiatric injuries are already causing, *e.g.*, by sending Respondent letters offering work when none was available, asking her to sign a resignation letter that stated she was resigning for "personal reasons" when in fact, she did not want to resign, by refusing to provide appropriate psychiatric care despite the uncontradicted medical evidence that she required same, and by continuing to maintain the position that Respondent has a "discriminatory preference" when there was no evidence of same. The litigation below was a textbook example of employer/carrier bad faith, and Respondent still, at this late date, cannot comprehend why Petitioners are maintaining litigation in numerous courts when they have accepted the validity of her injuries by providing the psychiatric care she wants and needs.

Respondent is confident that this Court will perceive that Petitioners' alleged constitutional claims have no factual basis and that certiorari will therefore be denied.

CONCLUSION

Petitioners herein have brought their unsupported allegations to several courts, all of which have rejected same, overtly or impliedly, as lacking factual and legal merit. Petitioners are now asking this Court for yet another forum upon which to impose their particular style of litigation, *i.e.,*: trial by fabrication. The judge of compensation claims' order shows that he properly relied upon medical and lay testimony in awarding psychiatric benefits (which Respondent still requires, and which Petitioners are providing to this very day) and indemnity benefits. Flippant comments of counsel and attempted distortions of fact cannot substitute for evidence, and for this reason Respondent respectfully asks this Court to decline further deny the Petition for Writ of Certiorari sought to review the final order herein.

Respectfully submitted,

RENÉE R. PELZMAN, ESQUIRE
Florida Bar Number 346152
BRIAN M. PELZMAN, ESQUIRE
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Attorneys at Law
1500 San Remo Avenue, Suite 235
Coral Gables, Florida 33146
Telephone (305) 666-8821

Counsel of Record for Respondent

APPENDIX

GATES McDONALD

October 24, 1990

Ronald L. Bergman, PH.D
15704 N.W. 2nd Avenue
Miami, Florida 33169

RE: Ruth Jandrucko
S.S. – 163-20-6245
Date of Injury – 4-4-86

Dear Dr. Bergman:

We administer the workers' compensation program for Fuqua Industries/Colorcraft regarding the above referenced file.

This letter is to authorize treatment of Ms. Jandrucko for the above workers' compensation injury of 4-4-86. Treatment is authorized as you deem medically necessary for recovery on this incident.

I ask that you mark your file for sending the billing along with your medical reports to our above address and if you need something further from our office please do not hesitate to be in contact. Thank you.

Yours very truly,

/s/ Denise Jenkins
Denise Jenkins
Sr. Claims Examiner

DAJ:daj

cc: Ruth Jandrucko, claimant
cc: S. Scott Stephens, Atty. for employer
cc: Renee R. Pelzman, Atty. for employee

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

FUQUA INDUSTRIES, INC., a Delaware corporation; QUALEX INC., a Delaware corporation, as successor by merger to COLORCRAFT CORPORATION, a North Carolina corporation,

Plaintiffs,

v.

CASE NO. 91-0842-CIV-Ryskamp

JOHN G. TOMLINSON, JR., in his official capacity as Judge of Compensation Claims, Division of Workers' Compensation, State of Florida, Department of Labor and Employment Security, and RUTH F. JANDRUCKO, individually,

Defendants.

_____/

NOTICE OF FILING AFFIDAVIT OF JAMES NEWTON

TAKE NOTICE that COLORCRAFT CORP. and FUQUA INDUSTRIES, INC., Employer/Carrier, by their undersigned attorney, herewith files an Affidavit of James Newton, dated May 6, 1991.

Respectfully submitted,

/s/ Jonathan L. Alpert
Jonathan L. Alpert
Florida Bar No. 121970
ALPERT, JOSEY & GRILLI, P.A.
P. O. Box 3270
Tampa, Florida 33601-3270
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Delivery to Renee Pelzman, Esquire, Attorney for Ruth F. Jandrucko, PELZMAN & RUSKA, P.A., 1500 San Remo Avenue, Suite 235, Atrium Building, Coral Gables, Florida 33146, and Paul Martin, Esquire, Attorney for John G. Tomlinson, Jr., Department of Legal Affairs, The Capital, Suite 1501, Tallahassee, Florida 32399-1050, this 8th day of May, 1990.

/s/ Jonathan L. Alpert
Jonathan L. Alpert

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

FUQUA INDUSTRIES, INC., a Delaware Corporation; QUALEX INC., a Delaware corporation, as successor by merger to COLORCRAFT CORPORATION, a North Carolina Corporation,

Plaintiffs,

v.

JOHN G. TOMLINSON, JR., in his official capacity as Judge of Compensation Claims, Division of Workers' Compensation, State of Florida, Department of Labor and Employment Security, and RUTH F. JANDRUCKO, individually,

Defendants.

CASE NO. 91-0842-CIV-RYSKAMP

AFFIDAVIT OF JAMES NEWTON

STATE OF GEORGIA :
: ss
COUNTY OF FULTON :
:

BEFORE ME, the undersigned authority, did personally appear JAMES NEWTON, a person well known to me, who, upon being duly sworn, deposed upon oath as follows:

1. My name is James Newton, and I am the Director of Loss Administration for Fuqua Industries, Inc.

2. On May 6, 1991, I mailed Fuqua's check in the amount of Forty-nine Thousand Two Hundred Fifty Dollars and 64/100ths ($49,250.64), payable to Ruth Jandrucks, to Renee Pelzman, Esquire, Pelzman & Ruska, P.A. 1500 San Remo Avenue, Suite 235, Atrium Building, Coral Gables, Florida, 33146, postage prepaid.

3. The said check was in payment of the benefits awarded pursuant to the April 26, 1990 Order of Judge Tomlinson, including penalties and interest thereon.

FURTHER AFFIANT SAYETH NOT.

/s/ James Newton
JAMES NEWTON

SWORN TO AND SUBSCRIBED before me this 6th day of May, 1991.

(SEAL)

/s/ Leif S. Still
NOTARY PUBLIC
State of Georgia

My Commission Expires:

Notary Public, Henry County, Georgia.
My Commission Expires July 13, 1993

* * *

[p. 30] accusing either defendant Jandrucko or defendant Tomlinson of being racists or bigots. No one is accusing or making any accusation along that line.

What the plaintiffs are saying is very simple. State workers compensation hearing officers may not award benefits for racial reasons because it invites disregard for the Fourteenth Amendment and invidiously discriminates under 1981, and 1983, which specifically addresses white people.

Two. The law in the twentieth century United States must be, to the extent possible, color blind. There is no federal jury instruction, there is no state jury instruction that says to a jury, in the instance of an interracial assault, if you find the assault was exacerbated because of fear of the member of the other race, you are to take that into account, and the reason is it is against the policy of the law. The law must control, not human emotions.

Chest pain may be fear of federal court, and there is no cause of action for that either, and we will proffer into the record at this time the proceedings below.

THE COURT: You can proffer that and file it later on, but I don't think my decision at this time will be based upon the record.

Under Rule 65 for a preliminary injunction, the courts have held that the court must make certain findings, a four part test, first of being the likelihood that the moving [p. 31] party will ultimately prevail on the merits of the claim.

BEST AVAILABLE COPY

This is a rather unique claim and at this point I am not convinced that the plaintiffs have established the likelihood that they might ultimately prevail on the merits.

Secondly, the irreparable nature of the injury. The Eleventh Circuit has held that merely payment of money is not irreparable injury, and apparently that's all I see at this present time.

The third one is the potential harm that might be caused to the opposing parties or others. I could see more harm at this point to the defendant than I can to the plaintiff at this time, and fourthly, the public interest. I am not sure that's a factor here.

In any event, I am not going to enter a preliminary injunction. I am going to vacate the temporary restraining order. I will let this case proceed in due course. I don't think there is any need for court intervention prior to resolving the merits of the claim.

I am very much concerned about the Rucker Feldman doctrine because it would appear that this case is still pending and it can be adjudicated properly in the state courts and that these issues could be raised there. I am concerned about abstention since this matter is still pending.

I still am concerned about the Eleventh Amendment. [p. 32] Although apparently there is no request for a money judgment, there is request for injunctive relief, and right now I am not sure whether the Eleventh Amendment prohibits injunctive relief also. I would have to review that.

I am concerned, though, about having this workmens compensation judge being a party here. It may be he doesn't get the same type of immunity that another type of state court judge might, but all of these are substantial factors that we can work through as the case progresses.

I wouldn't see any reason to delay the case at all, but I see no basis for a preliminary injunction nor to continue the temporary restraining order any further than today, so we will vacate the temporary restraining order as of this time.

Court will be in recess.

oOo

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ 6/10/91
Date

/s/ Richard Greenspan
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

FUQUA INDUSTRIES, INC., a Delaware corporation; QUALEX INC., a Delaware corporation, as successor by merger to COLORCRAFT CORPORATION, a North Carolina corporation,

Plaintiffs,

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JOHN G. TOMLINSON, JR., in his official capacity as Judge of Compensation Claims, Division of Workers' Compensation, State of Florida, Department of Labor and Employment Security, and RUTH F. JANDRUCKO, individually,

Defendants.

_____/

NOTICE OF APPEAL
Filed May 22, 1991

Notice is hereby given that Plaintiffs, FUQUA INDUSTRIES, INC., a Delaware corporation; QUALEX INC., a Delaware corporation, as successor by merger to COLORCRAFT CORPORATION, a North Carolina corporation (hereinafter Qualex and Colorcraft are collectively "Colorcraft"), by and through undersigned counsel, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Order denying Plaintiffs'

Motion For Preliminary Injunction entered of record in this action on the 8th day of May, 1991.

Respectfully submitted,

/s/ Jonathan L. Alpert
Jonathan L. Alpert
Florida Bar No. 121970
ALPERT, JOSEY &
GRILLI, P.A.
P. O. Box 3270
Tampa, Florida 33601-3270
Attorneys for Plaintiffs

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT TALLAHASSEE, FLORIDA

COLORCRAFT CORP. and FUQUA INDUSTRIES,

Appellants,

vs.

RUTH JANDRUCKO,

Appellee.

CASE NO.: 90-01598

LOWER CASE NO.: 163 20 6245

D/A 04/04/86

MOTION FOR REHEARING EN BANC OR, ALTERNATIVELY, REQUEST FOR CERTIFICATION

The Appellants, COLORCRAFT CORP. and FUQUA INDUSTRIES, by the through undersigned counsel, hereby file this Motion and pursuant to Rule 9.330 and 9.331 of the Florida Rules of Appellate Procedure. This Motion seeks two alternative forms of relief, specifically:

A. Rehearing en banc pursuant to Fla.R.App. 9.331 which is warranted due to the exceptional importance of the instant case:

1. This matter is one of first impression in this state,

2. This matter has constitutional implications requiring consideration of both the Constitution of the State of Florida as well as the United States Constitution, and,

3. This matter directly bears upon public policy and the public interest

B. Certification to the Florida Supreme Court pursuant to Fla.R.App. 9.330 which is warranted due to the

exceptional public important of the instant case as aforesaid.

ANALYSIS

Rule 9.331(b), Fla.R.App., which addresses rehearings en banc, provides in relevant part that " . . . a party may move for an en banc rehearing solely on the grounds that the case is of exceptional importance. . . . " With respect to Florida Supreme Court certification, the only reference to the procedure appears in the first sentence of Rule 9.330, Fla.R.App., which provides that "[a] motion for rehearing or for clarification of decision, or for certification, may be filed within fifteen days of an order or within such other time set by the court." Presumably, certification to the Florida Supreme Court would require a case of "great public importance" as well, although the Rule is silent on this question.

While there appear to be no explicit guidelines or criteria for use in determining whether a case satisfies the "great public importance" standard, Appellants would submit that the instant case warrants certification or rehearing en banc for several reasons.

1. The Instant Case Is One Of First Impression In The State.

Boiled to its essence, this case involves an individual who claims to be unable to work productively around black people. As a result, she does not work. The State of Florida, through the Division of Worker's Compensation,

has not only accepted Claimant's position, it is compensating her for it.

Specifically, Claimant herein essentially desires a racially segregated work place. Because such a desire violates the U. S. Constitution, the Florida Constitution, public policy and human decency, however, her employer did not accede to this request.

Having failed to achieve her goal, Claimant chose to remain home and file a workers' compensation claim. The Judge of Compensation Claims has ruled in favor of the Claimant, a ruling which essentially suggests to her employer, and others who may be similarly situated in the future, that an employer must racially segregate the work place upon demand of nay employee who is fearful of working with minorities.

To the best of Appellants' knowledge, this case involves the first instance anywhere in the nation where a state agency has financially sanctioned an organization for its failure to racially segregate the work place. Such a case would appear to warrant scrutiny by the Florida Supreme Court or, at a minimum, the en banc panel of this Court.

2. **The Instant Case Has Constitutional Implications.**

No doubt this Court is aware that Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

> deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis supplied.)

By awarding Claimant benefits herein based upon her inability to work with blacks, the State of Florida is violating the Fourteenth Amendment.

Furthermore, Section 2 of Article 1 of the Constitution of the State of Florida states that "[n]o person shall be deprived of any right because of race, religion or physical handicap." (Emphasis supplied.) The employer herein has been so deprived.

Regardless of how the instant case is ultimately resolved, there is no question that the matter has significant constitutional implications. Such a case requires more extensive scrutiny, either by this State's highest court or this Court's en banc panel.

3. This Case Concerns Public Policy And The Public Interest.

It should hardly require mention that issues of racial bias and segregation are intimately intertwined into public policy and the public interest. This case involves an individual who claims to have an inability to function in a desegregated work place. Yet to segregate any work place at the behest of a Claimant would be shameful. Racial bigotry should not be sanctioned by this Court. As a result, this is an issue of extreme public interest and importance. Cases touching on such an issue mandate the most careful appellate scrutiny.

CONCLUSION

Appellant respectfully requests that rehearing en banc be granted or, in the alternative, that this case be certified to the Florida Supreme Court as a matter of great public importance.

CERTIFICATION OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

Respectfully submitted,

/s/ Steven Davis
Steven C. Davis
Florida Bar No. 606741
Alpert, Josey & Grilli, P.A.
P. O. Box 3270
Tampa, Florida 33601-3270
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Renee Pelzman, Esquire, PELZMAN & RUSKA, P.A., 1500 San Remo Avenue, Suite 235, Atrium Building, Coral Gables, Florida 33146, this 8th day of March, 1990.

/s/ Steven Davis
Steven C. Davis

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO: 90-01598

COLORCRAFT CORPORATION and
FUQUA INDUSTRIES,

Appellants,

vs.

RUTH JANDRUCKO,

Appellee.

RESPONSE TO MOTION FOR REHEARING EN BANC OR REQUEST FOR CERTIFICATION

Appellee, by and through the undersigned counsel, files this Response to the Motion for Rehearing en Banc or Request for Certification filed by Appellants herein:

1. A panel of this Court affirmed the lower tribunal's award of workers' compensation benefits *per curiam* on February 25, 1991. Appellants are obviously dissatisfied with the panel's decision and are now rearguing the merits of the appeal, in contravention of Fla. R. App. P. 9.330 (a).

2. Secondly, even if this Court were to disregard Rule 9.330 and re-review the award of workers' compensation on its merits, it would surely conclude once more that the "factual" allegations made by Appellants are unsupported by the record and are nothing more than a vicious assault on Ruth Jandrucko's character, apparently in an effort to distract the Court from its proper focus on

Ms. Jandrucko's psychological and physical injuries. Although Appellants' counsel asserted throughout the course of litigation below that Ms. Jandrucko was a racist who was using her injury as an excuse to avoid contact with black persons, the Record shows that the exact opposite is true. Even Ms. Jandrucko's long-time supervisor testified, without contradiction, that she was always pleasant, helpful and generous toward her black co-workers and never voiced unpleasantries about anyone. In fact, the "racist" defense is not supported by any testimony whatsoever, including the depositions of Harold Adams (Appellee's supervisor) or by Nancy Lyman (the adjuster for Fuqua Industries), and it is Appellee's position that this "defense" was created by Appellants as an after-thought.

3. Appellants have also invoked Rule 9.331, Fla.R.App.P. in an effort to obtain reconsideration or certification of this matter. While Appellee agrees that there are no Florida cases directly on point regarding an award of benefits to an agoraphobic, there are many cases awarding benefits to persons who have suffered similar psychiatric traumas resulting from physical injury. Accordingly, Appellee cannot agree that this case is truly one of first impression.

Additionally, Appellants have misstated the evidence presented below in an effort to win further review, as follows:

a. The State of Florida is compensating Ms. Jandrucko for a psychiatric disability which causes her to be unable to work outside the home due to a medically-documented phobia. The workers' compensation laws

provide for such compensation if same is supported by competent, substantial evidence, as is the case herein. Accordingly, this is not justification for rehearing or certification.

b. Contrary to Appellants' allegation, there is no evidence that either Ms. Jandrucko or the JCC "desires a racially segregated work place". Again the Record shows that Ms. Jandrucko is extremely distressed about her inability to interact with black persons as she did pre-injury and that she would like to be able to return to an integrated, normal workplace. At no time did Ms. Jandrucko ask her employer to segregate the workplace, and her testimony shows that she would be the last person to countenance such action. Furthermore, the JCC did not order the employer to provide a segregated workplace, as such a command would have been beyond his jurisdiction and clearly improper. All the JCC ordered was that Ms. Jandrucko be compensated for her work-related psychiatric and physical disabilities, as supported by competent, substantial and virtually uncontradicted evidence.

c. The award of compensation to Ms. Jandrucko does not "essentially suggest" to the employer that they do anything whatsoever to change their workplace and no one other than Appellants has suggested such action. This state's workers' compensation laws were undoubtedly promulgated with an eye toward satisfying the needs of injured workers and their employers while not violating Constitutional guarantees, and the award of benefits in the instant cause had achieved that balance.

d. Equally important is Appellant's lack of standing to complain of a denial of equal protection of the laws.

The Employer is not a minority person or group to which the type of Constitutional guarantee attaches, nor has Appellant shown convincingly that the employer has been deprived of any constitutional rights because of race. To the contrary, and as the JCC's order states, Ms. Jandrucko's claim for benefits was carefully scrutinized so as to protect the rights of all parties. If we examine Appellants' allegations herein, we see that they are actually claiming that an injured worker with a phobia such as Ms. Jandrucko's should be denied compensation because they (the employer) cannot constitutionally segregate the workplace. This ignores completely injured workers' rights to compensation for unforeseeable injury occasioned by the circumstances of employment. In essence, Appellants herein want all the rights for themselves and none for Ms. Jandrucko. She has not requested that the employer segregate their workplace and she believes strongly that bigotry *is* shameful; however, due largely to Appellant's refusal to provide ongoing psychological therapy for her phobia after February, 1987, she is still phobic and cannot work productively around black persons. This is not a constitutional issue; it is a legal issue which the JCC properly decided and which does not warrant further appellate review.

4. Lastly, there is no public policy or public interest to be served herein. The words "racism" and bigotry" did not appear in this matter, literally or figuratively, until counsel for Appellants mouthed them in an effort to divert the JCC's attention from the improper denial of Ms. Jandrucko's medical and indemnity benefits. The JCC's enforcement of Florida's workers' compensation laws in this matter has nothing to do with public policy,

although Appellee would agree that fair and evenhanded enforcement of these laws is in the public interest. The Record demonstrates that the JCC was scrupulously fair and that his award of benefits was well supported by the evidence.

CONCLUSION

Appellee agrees that segregation in any shape or form is shameful and that no court should sanction bigotry. However, Appellants herein ignore both their lack of standing to raise the constitutional questions posed herein and the uncontradicted evidence that bigotry plays no part in Ms. Jandrucko's inability to work. The only shameful thing about the instant matter is that Appellants have mischaracterized the evidence and maligned the good character and reputation of the JCC and the claimant.

There is no reason, on the face of the Record or otherwise, for this Court to believe or sanction Appellants unfounded claims of bigotry. Accordingly, the request for rehearing *en banc* or certification to the Supreme Court should be denied.

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Steven C. Davis, Esq.,

P. O. Box 3270, Tampa, FL 33602 on this 18th day of March, 1991.

Respectfully submitted,

Pelzman & Ruska, Attorneys At Law
Attorneys for Appellee
Suite 235, 1500 San Remo Avenue
Coral Gables, FL 33146
(305) 666-8821

By: /s/ Renee R. Pelzman
Renee R. Pelzman, Esq.
Florida Bar Number
346152

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

March 20, 1991

CASE NO: 90-01598

L.T. CASE NO. 163-20-6245

Colorcraft Corp. and Fuqua Industries v. Ruth J. Jandrucko

Appellant(s), Appellee(s).

ORDER

Appellant's motion for rehearing en banc was not filed in conjuction [sic] with a Rule 9.330(a) motion for rehearing and is therefore a nonallowable motion under Rule 9.331 and is a nullity. State v. Kilpatrick, 420 So. 2d 868 (Fla. 1982), La Grande v. B & L Services, 436 So. 2d 337 (Fla. 1st DCA 1983). Accordingly, the motion for rehearing en banc must be dismissed as an unallowable motion under Rule 9.331, Florida Rules of Appellate Procedure.

By order of the Court
Jon S. Wheeler
Clerk

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Steven Scott Stephens
Steven C. Davis

Wendy England
Renee R. Pelzman
/s/ Laurie Black
Deputy Clerk

SEAL

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT TALLAHASSEE, FLORIDA

COLORCRAFT CORP. and FUQUA INDUSTRIES,

Appellants,

vs.

RUTH JANDRUCKO,

Appellee.

CASE NO.: 90-01598

LOWER CASE NO.: 163 20 6245

D/A/: 04/04/86

MOTION FOR CLARIFICATION OF DECISION

The Appellants, COLORCRAFT CORP. and FUQUA INDUSTRIES, by the through undersigned counsel, hereby file this Motion pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure, for clarification of this Court's Order of March 20, 1991, and state as follows:

1. On or about March 8, 1991, Appellants filed its "Motion for Rehearing En Banc Or, Alternatively, Request for Certification" in the instance case, seeking reconsideration of this Court's Order of February 25, 1991.

2. On March 20, 1991, this Court, through an order entered by Jon S. Wheeler, Clerk, entered an Order "dismissing" Appellants' Motion for Rehearing En Banc because it was not filed in conjunction with a motion for rehearing under Rule 9.330(A), Fla.R.App.P.

3. Appellants hereby request clarification concerning whether the Court's Order of March 20, 1991, effectively disposes of Appellants' request for certification, especially in light of the Court's disposition of Appellants' Motion for Rehearing En Banc in which the Court never addressed the merits of said Motion.

WHEREFORE, Appellants respectfully request that this Court clarify its Order of March 20, 1991, with respect to whether Appellants' request for certification remains pending before this Court.

Respectfully submitted,

/s/ Steven Davis
Steven C. Davis
The Florida Bar No. 606741
Alpert, Josey & Grilli, P.A.
Post Office Box 3270
Tampa, Florida 33601-3270
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Renee Pelzman, Esquire, PELZMAN & RUSKA, P.A., 1500 San Remo Avenue, Suite 235, Atrium Building, Coral Gables, Florida 33146, this 26th day of March, 1990.

/s/ Steven Davis
Steven C. Davis

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

March 26, 1991

CASE NO: 90-01598

L.T. CASE NO. 163-20-6245

Colorcraft Corp. and Fuqua Industries v. Ruth J. Jandrucko

Appellant(s), Appellee(s).

ORDER

Request for certification, filed March 11, 1991 in the motion for rehearing en banc, is denied.

By order of the Court
JON S. WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Steven Scott Stephens
Steven C. Davis
John G. Tomlinson, Jr.
Wendy England
Renee R. Pelzman

/s/ Laurie Black
Deputy Clerk

SEAL

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

April 2, 1991

CASE NO: 90-01598

L.T. CASE NO. 163-20-6245

Colorcraft Corp. and Fuqua Industries v. Ruth J. Jandrucko

Appellant(s), Appellee(s).

ORDER

The motion for clarification has been considered on the merits and is denied.

By order of the Court
JON S. WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Steven Scott Stephens
Steven C. Davis
Wendy England
Renee R. Pelzman

/s/ Laurie Black
Deputy Clerk

SEAL
